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No. 96-1578

In the Supreme Court of the United States

OCTOBER TERM, 1996

HON. THOMAS R. PHILLIPS, ET AL., PETITIONERS

v.

WASHINGTON LEGAL FOUNDATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether interest earned on client trust funds held by lawyers in the Interest on Lawyers Trust Accounts (IOLTA) program is a property interest of the client or lawyer, cognizable under the Fifth Amendment to the United States Constitution, despite the fundamental precept of IOLTA that such funds, absent the IOLTA program, could not earn interest for the client or lawyer.

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INTEREST OF THE UNITED STATES

This case presents the issue of what type of interests constitute "private property" protected by the Just Compensation Clause of the Fifth Amendment to the United States Constitution. Because that Clause applies directly to the programs and operations of the federal government, the United States has a vital interest in the Court's construction of that constitutional provision. Due to the size and national scope of the federal government's operations, moreover, its programs can often employ property in a manner that creates or enhances value that could not be realized by individual owners. The determination whether

such government-created value constitutes "private property" thus could affect significantly the federal government's responsibilities and liability under the Fifth Amendment. In addition, this case will address the interrelationship of interest on deposit accounts, which the federal government regulates, and the constitutional definition of "private property." Finally, the United States has an interest in equitable access to the justice system, and in ensuring that IOLTA programs, which have been developed in virtually all States, are not undermined by an interpretation of the Just Compensation Clause that departs from settled practices and understandings.

STATEMENT

1. In the course of their practice, attorneys are frequently required to hold client funds for a certain period of time. Like every other State, Texas has established ethical rules of conduct that regulate how attorneys must handle client funds. Texas Bar Rule 1.14(a) provides that lawyers "shall hold funds and other property belonging in whole or in part to clients * * * separate from the lawyer's own property." Texas Bar Rules, Art. X, § 9 (1997). Funds must be kept in a distinct "'trust' or 'escrow' account." *Ibid.* The account must permit withdrawal on demand. Pet. App. 2a; Texas Bar Rules, Art. X, § 9, Rule 1.14(b).

Occasionally, client funds provided to a lawyer are so nominal in amount or are held for so short a period of time that either they cannot be expected to earn interest or any interest earned would be offset by the administrative expense of opening and maintaining a separate account. See Pet. App. 3a.[1] Traditionally, attorneys deposited such

[1] Examples of such client funds include real estate escrow funds, advance payments of costs and filing fees, retainers, and settlement funds.

funds into a single, pooled, non-interest bearing account. *Washington Legal Found.* v. *Massachusetts Bar Found.*, 993 F.2d 962, 968 (1st Cir. 1993) (citing additional cases). The depository institution thus retained for itself whatever interest value the deposited funds generated. *Ibid.*

In 1980, Congress authorized the creation of Negotiable Order of Withdrawal (NOW) accounts, which both bear interest and leave the funds available for immediate withdrawal. 12 U.S.C. 1832. NOW accounts are permitted only for deposits that "consist solely of funds in which the entire beneficial interest is held by one or more individuals or by an organization which is operated primarily for religious, philanthropic, charitable, educational, political, or other similar purposes and which is not operated for profit." 12 U.S.C. 1832(a)(2); see also 12 C.F.R. 204.130. For-profit corporations and partnerships are thus prohibited from receiving interest on demand deposits.

In 1984, Texas adopted an Interest on Lawyers Trust Account (IOLTA) program. Pet. App. 3a. Under the IOLTA program, attorneys continue to pool into a single deposit account those client funds that "are nominal in amount or are reasonably anticipated to be held for a short period of time." Texas Bar Rules, Art. XI, § 5(A); Rules Governing the Operation of the Texas Equal Access to Justice Program (IOLTA Rule) 4 (1997). The Texas IOLTA rules require, however, that attorneys deposit their pooled funds into an interest-bearing NOW account, rather than into a non-interest-bearing, demand account. *Ibid.*[2] The interest generated by each attorney's IOLTA

[2] In an opinion letter issued in 1981, the General Counsel of the Federal Reserve Board concluded that NOW accounts could be employed by Florida's IOLTA program. Letter from General Counsel Bradfield to D. Middlebrooks (Oct. 15, 1981), *reprinted in* D. Middlebrooks, *The Interest on Trust Accounts Program: Mechanics of its Operation*, 56 Fla. B.J. 115, 117 (Feb. 1982). The Board has provided similar letters

account is paid to the Texas Equal Access to Justice Program, a non-profit corporation established by the Texas Supreme Court. Texas Bar Rules, Art. XI, §§ 3, 4; IOLTA Rules 1, 2. The Texas Equal Access to Justice Program distributes the funds to non-profit organizations that "have as a primary purpose the delivery of legal services to low income persons." IOLTA Rule 10; see also Texas Bar Rules, Art. XI, § 2(B); Pet. App. 4a.

The Texas program requires that client funds be deposited in IOLTA accounts only if, due to their small amount or to the short duration of time for which they are held, the attorney determines that

> such funds, considered without regard to funds of other clients which may be held by the attorney, law firm or professional corporation, could not reasonably be expected to earn interest for the client or if the interest which might be earned on such funds is not likely to be sufficient to offset the cost of establishing and maintaining the account, service charges, accounting costs and tax reporting costs which would be incurred in attempting to obtain interest on such funds for the client.

IOLTA Rule 6.[3] If an attorney initially determines that client funds should be deposited in an IOLTA account, the

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to virtually every jurisdiction operating an IOLTA program. Texas received letters from the Board and the Federal Deposit Insurance Corporation in August 1985 advising that its IOLTA funds were eligible for deposit in a NOW account. (We have lodged copies of the Texas letters with the Clerk of the Court.)

[3] IOLTA Rule 6 provides that the decision whether client funds are incapable of generating interest should be made "without regard to funds of other clients which may be held by the attorney." That restriction prevents an attorney from using the funds of multiple clients to generate interest for a single client or using other clients' funds to pay the administrative costs incurred in earning interest for a single

attorney thereafter "should review at reasonable intervals whether changed circumstances" (such as a delay in litigation) will permit the client funds to generate realizable interest; if so, the attorney is expected to transfer the funds to an account that earns interest for the client. *Ibid.*[4]

The Internal Revenue Service does not attribute the interest generated by an IOLTA account to the individual clients or lawyers for federal income tax purposes, because they do not have control over the decision whether to place the funds in the IOLTA account and they do not designate who will receive the interest from the account. Rev. Rul. 81-209, 1981-2 C.B. 16; see also Rev. Rul. 87-2, 1987-1 C.B. 18.[5]

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client. Where, however, an attorney can pool nominal or short-term client funds and generate sufficient interest to offset the administrative costs of sub-accounting and apportioning the interest among all clients in the pool, the attorney must create an interest-bearing account for the clients, rather than deposit the funds in an IOLTA account. Pet. App. 24a n.2; Reply Br. Pet. Stage 2 n.1; Texas Bar Rules, Art. XI, § 5(B); cf. IOLTA Rule 22 (nothing in IOLTA can require an attorney to take any action that violates the Texas Code of Professional Responsibility, Texas Bar Rules, Art. X, § 9). Because of the limitations on NOW accounts, however, only the funds of individual or non-profit clients can be included in such a pool.

[4] If the attorney does not have access to a depository institution that will pay interest on such pooled, demand accounts, then the attorney "is required to maintain a non-interest bearing client trust account for such funds." IOLTA Rule 4B.

[5] Since the 1981 Revenue Ruling, the Internal Revenue Service has provided private letter rulings to numerous jurisdictions with IOLTA programs advising that the interest created by their programs will not be attributed to the clients or lawyers as taxable income. *E.g.*, Priv. Ltr. Rul. 85-27-058, 1985 WL 293058 (Apr. 9, 1985); Priv. Ltr. Rul. 84-28-087, 1984 WL 266482 (Apr. 11, 1984); Priv. Ltr. Rul. 83-16-108, 1983 WL 198254 (Jan. 19, 1983).

Currently, 48 States and the District of Columbia have adopted analogous IOLTA programs.[6] In addition to Texas, twenty-six States make attorneys' participation in

[6] See Ala. R.P.C. 1.15(g) (Michie 1996); Alaska R.P.C. 1.15(d) (1997); Ariz. Sup. Ct. R. 44(c)(2) (West 1997); Ark. R.P.C. 1.15(d)(2) (Michie 1997); Cal. Bus. & Prof. Code § 6211(a) (West 1990); Colo. R.P.C. 1.15(e)(2) (West 1997); Conn. R.P.C. 1.15(d) (West 1996); Del. R.P.C. 1.15(h) (Michie 1997); D.C. R. Ct. App. B(a) (West 1997); Fla. Bar R. 5.1-1 (West 1997); Ga. C.P.R. DR 9-102(C) (Michie 1997); Haw. Sup. Ct. R. 11 (Michie 1997); Idaho R.P.C. 1.15(d) (West 1997); Ill. R.P.C. 1.15(d) (West 1997); Iowa C.P.R. DR 9-102 (West 1997); Kan. R.P.C. 1.15(d)(3) (West 1997); Ky. Sup. Ct. R. 3.130 (Michie 1997); La. R.P.C. 1.15(d) (West 1997); Me. C.P.R. 3.6(e)(4) (West 1996); Md. Bus. Occ. & Prof. Code Ann. § 10-303 (1995); Mass. Sup. Ct. R. 3:07 (West 1997); Mich. R.P.C. 1.15(d) (West 1997); Minn. R.P.C. 1.15(d) (West 1997); Miss. R.P.C. 1.15(d) (West 1996); Mo. R.P.C. 1.15(e) (West 1997); Mont. R.P.C. 1.18(b) (West 1997); Neb. Sup. Ct. R. Trust Acct. (West 1997); Nev. Sup. Ct. R. 217 (Michie 1996); *In re New Hampshire Bar Ass'n*, 453 A.2d 1258 (N.H. 1982); N.J. R. Gen. App. 1:28A-2 (West 1997); N.M. R.P.C. 16-115(D) (Michie 1995); N.Y. Jud. Law § 497 (McKinney Supp. 1997); N.C. R.P.C. 10.3 (West 1997); N.D. R.P.C. 1.15(d)(1) (West 1997); Ohio Rev. Code Ann. § 4705.09(A)(1) (Anderson 1997); Okla. R.P.C. 1.15(d) (West 1997); Ore. C.P.R. DR 9-101(D)(2) (West 1997); Pa. R.P.C. 1.15(d) (West 1997) & Pa. R. Disc. Enf. 601(d) (West 1997); S.C. App. Ct. R. 412 (Law. Co-op. 1988); S.D. R.P.C. 1.15(d)(4) (Michie 1995); Tenn. C.P.R. DR 9-102(C)(2) (West 1996); *In re Interest on Lawyers' Trust Accounts*, 672 P.2d 406 (Utah 1983); Va. Sup. Ct. R. Pt. 6, § 4, ¶ 20 (Michie 1997); Vt. C.P.R. DR 9-103 (West 1996); Wash. R.P.C. 1.14(c)(1) (West 1997); W. Va. R.P.C. 1.15(d) (Michie 1997); Wis. Sup. Ct. R. 13.04, 20:1.15 (West 1997); Wyo. R.P.C. 1.15(II) (Michie 1997); see also ABA/BNA, *Lawyers' Manual on Professional Conduct* § 45:201 (1997). Indiana is the only State that has not implemented an IOLTA program. See *In re Indiana State Bar Ass'n Petition*, 550 N.E.2d 311 (Ind. 1990). IOLTA programs also operate in every Canadian province, South Africa, Namibia, Zimbabwe, and five Australian states. T. Gonser, D. Almond & F. Ziegler, *Financing Public Services Activities with Interest-Bearing Attorney Trust Accounts*, 15 Idaho L. Rev. 219, 221 & n.6 (1979).

the program mandatory.[7] The remaining jurisdictions operate IOLTA programs in which participation by attorneys is voluntary.[8]

2. The respondents in this Court are the Washington Legal Foundation; Michael Mazzone, a Texas attorney; and William Summers, a Texas client with funds deposited in an IOLTA account. They filed suit in the United States District Court for the Western District of Texas against petitioners, the Texas Equal Access to Justice Foundation; W. Frank Newton, chair of the Foundation; and the nine individual Justices of the Texas Supreme Court, alleging that the Texas IOLTA program violates the Fifth and Fourteenth Amendments because it unconstitutionally takes private property—the interest generated on IOLTA accounts—without just compensation. J.A. 2-17.

The district court granted summary judgment in favor of petitioners. Pet. App. 20a-40a. The court of appeals reversed, relying in large part on this Court's decision in

[7] Those additional States are Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Vermont, Washington, West Virginia, and Wisconsin.

[8] In some of those jurisdictions, participation is expressly made voluntary (New Mexico, Oklahoma, and South Dakota), while others contain opt-out provisions (Alabama, Alaska, Delaware, District of Columbia, Idaho, Kansas, Kentucky, Maine, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, North Carolina, Rhode Island, South Carolina, Tennessee, Utah, Virginia, and Wyoming). Because respondents challenge only the mandatory aspect of Texas's IOLTA program (see J.A. 16), this case presents no occasion for the Court to address whether voluntary IOLTA programs create "private property" within the meaning of the Fifth Amendment.

[9] The complaint also asserts a violation of respondents' speech and associational rights under the First Amendment. J.A. 14.

Webb's Fabulous Pharmacies, Inc. v. *Beckwith*, 449 U.S. 155 (1980). Pet. App. 1a-19a.

A divided court of appeals denied petitioners' suggestion of rehearing en banc. Pet. App. 41a-52a. Four of the six dissenting judges emphasized that, to rise to the level of "property" under the Just Compensation Clause, the interest at issue must "have some actual or potential *compensable* value that could accrue to the benefit of its owner." *Id.* at 48a. The just compensation prong of the Clause, however, would afford respondents "nothing," because the "fair market value of the earnings of IOLTA-eligible funds is $0." *Id.* at 49a. The dissent further found "both ironic and fatal to [respondents'] claim that in order to have a property interest in this case, they must rely on the existence of the program they seek to eliminate." *Id.* at 48a.

SUMMARY OF ARGUMENT

The IOLTA program, by generating interest that could not otherwise be realized, does not take the individual clients' "private property," within the meaning of the Fifth Amendment. There is no question that the underlying funds are, and at all times remain, the property of the client. The issue is whether the government's temporary regulation of how those funds are managed while in the custody of the client's attorneys deprives the client of any recognized property right. It does not. The client has no reasonable expectation that the funds given over to the attorney will generate interest during that time. Because the individual client cannot control how the attorney handles other clients' money, moreover, the client has no reasonable prospect of enhancing the interest-earning capacity of his funds by pooling his money with others.

Respondents thus seek to claim as their personal property a value that a client's individual funds simply are incapable of generating. IOLTA interest is realized only

through the application of governmental capabilities and resources. This Court's Fifth Amendment jurisprudence focuses, however, on what the owner has lost, not on what the government has gained. Individuals may not claim as a property loss, entitled to just compensation, value that the government has created. Indeed, respondents' claimed property right to IOLTA interest, if recognized, would create an unworkable incongruity between the property that the Just Compensation Clause protects and the property values that the Clause reimburses.

ARGUMENT

INTEREST GENERATED THROUGH THE IOLTA PROGRAM IS A GOVERNMENT-CREATED VALUE AND THUS IS NOT "PRIVATE PROPERTY" WITHIN THE MEANING OF THE FIFTH AMENDMENT

A. Introduction

The term "private property" in the Just Compensation Clause of the Fifth Amendment denotes "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74, 82 n.6 (1980).[10] The question whether interest earned on an IOLTA account qualifies as a "right[] inhering in" respondents' relation to their individual funds is ultimately a question of federal constitutional law. *United States* v. *Powelson*, 319 U.S. 266, 279 (1943). This Court has recognized, however, that the Constitution does not create property rights. Rather, property rights "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as

[10] The Fifth Amendment's Just Compensation Clause applies to the States through the Fourteenth Amendment. *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 122 (1978).

state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972);[11] see also *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992); *United States* v. *Willow River Power Co.*, 324 U.S. 499, 502 (1945) ("not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them"). For that reason, respondents' property claim must be evaluated in light of the specific regulatory framework and factual context in which it arises.

There can be no doubt that the client funds underlying the IOLTA program are the property of respondents. Nothing in IOLTA affects that property interest. Those funds remain at all times fully and freely available to respondents upon demand. Funds are regulated under the IOLTA program only after a client has made an independent decision to segregate and dedicate his funds to a specified legal activity or service. IOLTA thus does not implicate funds that a client could otherwise employ to earn interest by, for example, depositing in a bank account or pooling with other personal assets.

When clients choose to deposit money with their attorneys, they create a relationship that is subject to the States' "compelling interest in the practice of professions within their boundaries, and * * * broad power to establish standards for * * * regulating the practice of professions." *Florida Bar* v. *Went For It, Inc.*, 515 U.S.

[11] *Roth* interpreted the scope of "property" under the Due Process Clause, which may not be coterminous with the "private property" protected by the Just Compensation Clause. See *Pittman* v. *Chicago Bd. of Educ.*, 64 F.3d 1098, 1104 (7th Cir. 1995), cert. denied, 116 S. Ct. 2497 (1996); cf. *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224 (1986); *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 430-431 (1982).

618, 625 (1995). The client is charged with knowledge that the State will regulate the handling of his funds for the protection of the integrity of the legal system. With respect to IOLTA programs, then, governmental regulation of private property commences, not with the collection of interest, but with the imposition of ethical strictures that require counsel to deposit the funds in a banking institution and compel counsel, as a matter of financial practicality, to pool short-term and nominal client funds in a single account.

Respondents do not question Texas's authority to impose ethical regulations on how attorneys handle client funds. Nor do they challenge the requirement that their funds be deposited in a banking institution or the practical necessity for counsel to pool short-term and nominal client funds into a single account. Finally, respondents do not contend that the pre-IOLTA regulatory scheme, under which nominal and short-term client funds were deposited into a non-interest bearing account, took their private property, even though the consequence of that legal regime was that their funds generated interest value for the exclusive enjoyment of the depository institution. See *Cone* v. *State Bar of Florida*, 819 F.2d 1002, 1005 (11th Cir.) ("Before the initiation of the [IOLTA program], the only beneficiaries of the old regime were the banks, who were treated to 'free' use of trust account deposits."), cert. denied, 484 U.S. 917 (1987); *In re Interest on Lawyers' Trust Accounts*, 675 S.W.2d 355, 357 (1984) ("At present, the earnings of funds held in trust accounts can benefit neither the attorney nor the client, but simply redound to the benefit of the depository institution."), modified, 689 S.W.2d 352 (1985), modified, 709 S.W.2d 400 (1986), amended, 738 S.W.2d 803 (Ark. 1987); J.A. 74-75. The question presented in this case therefore is whether, simply by requiring that the interest earned on the pooled funds be

provided to the Texas Equal Access to Justice Foundation rather than to the depository institution, IOLTA gave birth to a private property claim to the interest.[12]

B. Because Respondents Had No Reasonable, Investment-Backed Expectation That Their Funds Would Generate Interest, The Proceeds Of The IOLTA Account Are Not Respondents' Property

IOLTA does not physically appropriate client funds, nor does it deprive client funds of any—let alone all—economically beneficial or productive use of their money. See *Lucas*, 505 U.S. at 1014-1015; see also *PruneYard Shopping Ctr.*, 447 U.S. at 84. It is, moreover, the client's decision to set the nominal or short-term funds aside for legal services that prevents them, temporarily, from generating interest or being put to other productive use. IOLTA simply regulates the interest-bearing capacity of funds while in the custody of state-licensed attorneys and governmentally regulated banks. See *Yee* v. *City of Escondido*, 503 U.S. 519, 522-523, 527-528 (1992) (distinguishing, for purposes of Fifth Amendment analysis, between per se takings of property and governmental regulation of how property is used); cf. *United States* v. *Sperry Corp.*, 493 U.S. 52, 62 & n.9 (1989) (retention of a percentage of monetary award roughly equivalent to administrative costs does not effect a permanent physical occupation of property and thus is not a per se taking).

[12] Almost every court that has addressed the question has held that an IOLTA program does not result in a taking of private property in violation of the Fifth Amendment. *Massachusetts Bar Found.*, 993 F.2d at 973-974; *Cone*, 819 F.2d at 1004-1007; *In re Massachusetts Bar Ass'n*, 478 N.E.2d 715, 718 (Mass. 1985); *IOLTA Adoption Order*, 102 Wash.2d 1101, 1101-1109 (1984); *In re Minnesota State Bar Ass'n*, 332 N.W.2d 151, 158 (Minn. 1982); *In re New Hampshire Bar Ass'n*, 453 A.2d 1258, 1261 (N.H. 1982); *In re Interest on Trust Accounts*, 402 So. 2d 389, 395-396 (Fla. 1981); *Carroll* v. *State Bar of California*, 213 Cal. Rptr. 305, 311-312 (Cal. Ct. App.), cert. denied, 474 U.S. 848 (1985); see also *In re Interest on Lawyers' Trust Accounts*, 672 P.2d 406, 408 (Utah 1983); *In re Interest on Lawyers' Trust Accounts*, 675 S.W.2d at 356-358. But see *In re Indiana State Bar Ass'n Petition*, 550 N.E.2d at 312; *In re Interest on Trust Accounts*, 402 So. 2d at 399 (Boyd, J., dissenting).

1. In challenging IOLTA's regulatory program as a taking of private property, respondents must show that the program deprives them of "interests that were sufficiently bound up with the reasonable expectations of [respondents] to constitute 'property' for Fifth Amendment purposes." *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 125 (1978). Respondents, in other words, must demonstrate that they had a concrete and justifiable expectation of earning interest on funds while in their attorneys' custody, if they wish to claim IOLTA interest as their own. They can make no such showing.

In the complaint, as well as in an affidavit filed in support of respondents' motion for summary judgment, respondent Mazzone acknowledged that the nominal and short-term funds he holds for clients "cannot practicably be placed into separate interest-bearing accounts, because the additional costs of establishing and maintaining such accounts usually would exceed any interest I could earn for my clients." J.A. 83; see also J.A. 10. Respondent Summers, a client, likewise characterized the creation of an independent account for his funds to be "an unfeasible option because the cost of establishing and administering a separate account for my funds most likely would exceed any interest that could be earned on those funds." J.A. 86; see also J.A. 12. Respondents thus concede that they had no reasonable expectation that the funds the clients deposited with their lawyers would generate interest for their benefit.[13]

[13] See also Formal Op. 348, 68 A.B.A. J. 1502, 1506 (July 1982) ("The client has no right under the circumstances to require the payment of

Respondents also could not reasonably expect that interest would be realized for them by pooling their funds with the money of other clients. First, Texas's IOLTA program, by definition, does not apply if the attorney can pool nominal or short-term client funds and generate sufficient interest to offset the administrative costs of subaccounting and apportioning the interest among all clients in the pool. IOLTA Rule 6; Texas Bar Rules, Art. XI, § 5(B); see also Pet. App. 24a n.2; Pet. Reply 2 n.1.

Second, individual clients have no right inhering in the traditional attorney-client relationship to require counsel to pool their funds with the money of other clients. Rather, the focus of an attorney's ethical duty in managing client funds is "on safekeeping, accounting, and delivery, and not on investment of the funds." Formal Op. 348, 68 A.B.A. J. 1502, 1503 (July 1982); see also *In re Interest on Trust Accounts*, 402 So. 2d 389, 394 (Fla. 1981); IIA A. Scott & W. Fratcher, *The Law of Trusts* § 180 (deposit of trust fund into bank account "is usually not a form of investment but is a method of safekeeping"), § 181 (where purpose of trust is to safeguard funds, trustee bears no duty to make the trust productive) (4th ed. 1987). Nor have respondents demonstrated a reasonable expectation that other clients would wish to pool their funds with them.[14] Respondents thus can make no argument that the IOLTA program diminishes the economic value of their

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any interest on the funds to himself or herself because the amount of interest which the funds could earn is likely to be less than the appropriate charges for administering the earnings.").

[14] For those same reasons, the court of appeals' speculation that a single attorney's clients might agree to pool their funds for the benefit of a single charity (Pet. App. 15a) does not provide a sound basis for recognizing a property right in individual clients in the interest earned on an IOLTA account.

funds or deprives them of any independent capacity to dedicate their money to more fruitful endeavors.

2. Nothing in the law, either preceding adoption of the IOLTA program or presently, "secured" respondents' "claim of entitlement to" IOLTA interest. *Roth*, 408 U.S. at 577. As they concede, nothing in prior banking laws or regulations permitted a client's limited funds to realize interest while on deposit in a demand account. Texas law guaranteed that interest would accrue to the benefit of the principal's owner when (i) interest was actually realized by the individual property, (ii) the amount of the interest exceeded the reasonable costs of managing the account, and (iii) the claimant owned the entire fund generating the interest. See *Sellers* v. *Harris County*, 483 S.W.2d 242, 243-244 (Tex. 1972). The client moneys at issue in this case satisfy none of those conditions.

Nor can respondents claim that the right to accrue interest on deposits is a property value traditionally recognized as "inhering in the citizen's relation to" money. *PruneYard Shopping Ctr.*, 447 U.S. at 82 n.6. To the contrary, government has historically regulated the capacity of money to earn interest, by setting the terms and conditions under which interest will be paid on bank deposits in order to promote the public good.

Under the common law, "interest could in no case be recovered," and, indeed, the concept of paying interest "was held in detestation." *National Bank of the Commonwealth* v. *Mechanics' Nat'l Bank*, 94 U.S. (4 Otto.) 437, 438 (1876); see also S. Perley, *Principles of the Law of Interest* 1 (1893) ("In early times, in conformity to the canons of the church, all interest whatever upon money loaned was prohibited. To take [interest] was, also, *in foro conscientiae*, punished as a crime next to that of murder.")

(footnote omitted).[15] As a result, the ability to obtain interest has never been understood as an entitlement or a right. Until the latter half of the nineteenth century, the purpose of depositing money in a bank was generally for safekeeping, not to generate interest. 1 F. Redlich, *The Molding of American Banking: Men and Ideas* 7, 13-14 & n.99 (1968). A depositor could claim interest only if it was specified by contract. *Parkersburg Nat'l Bank* v. *Als*, 5 W. Va. 50, 55-56 (1871); *Haswell* v. *Farmers & Mechanics' Bank*, 26 Vt. 100, 103-104 (1853); *Jones* v. *Mallory*, 22 Conn. 386 (1853); Perley, *supra*, at 5.[16]

During this century, "governmental controls of American banking [became] manifold." *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 327 (1963). Indeed, this Court has described federal banking regulations as "the outstanding example in the federal government of regulation of an entire industry through methods of supervi-

[15] In 1545, the outright prohibition on paying interest of any sort was repealed by statute. A Bill Against Usury, 37 Hen. 8, ch. 9 (1545), cited in P. Siegel, *Interest on Lawyers' Trust Account Programs: Do They "Take" "Property" of the Client?*, 36 U. Fla. L. Rev. 674, 683 n.43 (1984).

[16] In the mid-nineteenth century, competition by banks for deposits led to the payment of ever-increasing interest rates, and the excessive interest paid on deposits was seen as a leading cause of the bank failures of 1857, 1873, and 1885. A. Cox, *Regulation of Interest Rates on Bank Deposits* 3-5 (1966). The Comptroller of the Currency concluded that the payment of interest on deposits "has done more than any other to demoralize the business of banking." *Annual Report of the Comptroller of the Currency*, H.R. Exec. Doc. No. 3, 43d Cong., 1st Sess. 31 (1873). The Comptroller accordingly endorsed self-regulation by the banking industry to limit or eliminate interest on deposits. *Ibid.* Well into the 1920s, the federal government continued to pressure banks to limit the interest they paid on deposits. See Federal Reserve Bulletin, VI, at 157 (Feb. 1920) ("[W]e recommend to the banks and trust companies in the various Federal Reserve districts that no rate in excess of 2 1/4 per cent be paid."); Cox, *supra*, at 8.

sion." *Id.* at 330. Of particular relevance to this case, in response to the bank failures of the 1920s and 1930s, Congress enacted the Banking Act of 1933, ch. 89, 48 Stat. 162, which prohibited Federal Reserve member banks from paying any interest on demand deposits. 12 U.S.C. 371a. In 1935, Congress similarly directed the FDIC to prohibit insured, non-member banks from paying interest on demand deposits. Banking Act of 1935, ch. 614, § 101, 49 Stat. 702 (codified at 12 U.S.C. 1828(g)). Congress later directed the Secretary of the Treasury, the Federal Reserve Board, the Federal Deposit Insurance Corporation (FDIC), and the Federal Home Loan Bank Board to implement their respective powers "to bring about the reduction of interest rates to the maximum extent feasible in the light of prevailing money market and general economic conditions." Act of Sept. 21, 1966, Pub. L. No. 89-597, § 1, 80 Stat. 823. In 1973, Congress extended to all depository institutions the prohibition on paying interest on demand deposits. Act of Aug. 16, 1973, Pub. L. No. 93-100, § 2, 87 Stat. 342; see also 12 U.S.C. 1464(b)(1)(B). In addition, the Federal Reserve Board and the FDIC capped the interest rate that banks could pay on all other types of accounts. 12 C.F.R. 217.7 (Federal Reserve Board Regulation Q), 329.6 (FDIC regulation) (1974).

Beginning in 1978, with the enactment of the Financial Institutions Regulatory and Interest Rate Control Act, Pub. L. No. 95-630, 92 Stat. 3641, Congress eased its interest rate regulation. The Depository Institutions Deregulation Act of 1980, Pub. L. No. 96-221, Tit. II, 94 Stat. 142 (codified at 12 U.S.C. 3501-3509 (1982)), largely withdrew, over a six-year period, the direct regulation of interest rates on time deposits. That Act both eliminated the interest rate ceilings on all interest-bearing deposit accounts, which had been enforced by Federal Reserve Board Regulation Q and the FDIC, and permitted banks to pay

interest on checking deposits (NOW accounts) maintained by individuals or charitable organizations. 12 U.S.C. 1832; 12 C.F.R. 204.130.

Federal regulation of interest continues in several forms. First, federal law still prohibits the payment of interest on demand deposits maintained by businesses. 12 U.S.C. 371a, 1464(b)(1)(B), 1828(g).[17] Second, a bank offering depositors above-market rates may be engaging in an unsafe banking practice, making it subject to a cease-and-desist order pursuant to the federal banking regulators' enforcement authority. 12 U.S.C. 1818(a) and (b). Third, the Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2236, prohibits banks with capital below a designated level from paying above-market rates on pooled, brokered deposits. 12 U.S.C. 1831f(e).

The federal government has thus frequently regulated and limited the payment of interest to promote important public policy goals. In many of those instances, moreover, restrictions on the payment of interest have inured to the economic benefit of others, such as the depository institution that is permitted to enjoy the interest-generating capacity of funds in its accounts.

Given this overall framework, when respondents chose to provide money to their attorneys and to have it injected into the highly regulated banking system, they could have had no reasonable expectation either that they would receive interest on their nominal or short-term funds, or that statutes and regulations might not result in others benefitting economically from the presence of their funds in the banking system. Cf. *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1006-1007 (1984) (Because "Monsanto chose

[17] A bill was recently introduced in Congress that would allow interest to be paid on the demand accounts of businesses. H.R. 2323, 105th Cong., 1st Sess. (July 31, 1997).

to submit the requisite data in order to receive a registration, it can hardly argue that its reasonable investment-backed expectations are disturbed when [the agency] acts to use or disclose the data in a manner that was authorized by law at the time."); *Andrus* v. *Allard*, 444 U.S. 51, 66 (1979) ("[P]erhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests.").[18] Respondents could reasonably expect only to have their principal available to them upon demand and, at most, to retain any interest their individual funds actually generated, under existing law, in excess of administrative costs. IOLTA does not affect those interests. Cf. *Sperry*, 493 U.S. at 62 (governmental retention of percentage of monetary award that bears reasonable relationship to administrative costs is not a taking).

In sum, "[i]n the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others." *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1986). But, "[g]iven the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another." *Ibid.*; see also *id.* at 228 (O'Connor, J., concurring).

C. As A Government-Created Value, IOLTA Interest Is Not A Component Of Private Property Protected By The Fifth Amendment

The "private property" that is protected by the Just Compensation Clause does not include every potentially

[18] See also *Tellis* v. *Godinez*, 5 F.3d 1314, 1317 (9th Cir. 1993) (Farris, J., dissenting) ("I would welcome a constitutional right to interest, as would others in the marketplace, but there is none."), cert. denied, 513 U.S. 945 (1994).

valuable use of property. In particular, the Fifth Amendment does not require compensation for value that the government creates through the application of its own resources or a consolidation of interests, especially if the individual owner could not reasonably develop that value on his own. Because IOLTA interest is the product of the government's pooling of funds, rather than of the earning capacity of the money in the hands of its individual owners, the interest that IOLTA generates is government-created value and thus is not "private property" within the meaning of the Fifth Amendment.

1. At its core, respondents' position claims as property the interest-generating power of all the clients' combined funds, rather than the interest-generating capacity of each individual client's holdings. In effect, respondents argue that the whole is greater than its parts: that while no right to accrue interest was taken from the individual clients, once combined into a pool, the property interests of the individual owners expanded and that combined power to accrue interest is what petitioners have taken. This Court's Fifth Amendment jurisprudence forecloses that argument.

Where a taking has occurred, the proper inquiry in ascertaining the amount of compensation due under the Fifth Amendment is "what has the owner lost, and not what has the taker gained." *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 76 (1913); see also *Olson* v. *United States*, 292 U.S. 246, 255 (1934) (The Fifth Amendment entitles a property owner to be "put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more."). Here, respondents have lost nothing.

In *Boston Chamber of Commerce* v. *City of Boston*, 217 U.S. 189 (1910), the owners of three separate property interests (the fee, a mortgage on the fee, and an easement) brought suit seeking compensation for the laying of a public street over their property. Rather than requesting payment for the value of their individual property losses, the owners sought compensation for the combined value of the property, which greatly exceeded the value of the distinct interests. *Id.* at 193. This Court held that the Fifth Amendment does not evaluate property interests as a whole when they are not held as a whole. *Id.* at 195 ("But the Constitution does not require a disregard of the mode of ownership * * *. It does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole."). Rather, the Fifth Amendment "merely requires that an owner of property taken should be paid for what is taken from *him*." *Ibid.* (emphasis added).

Likewise, in *City of New York* v. *Sage*, 239 U.S. 57 (1915), the Court held that the compensation due for a lot taken to build a reservoir did not include the enhanced value of the property "due to its union with other lots." *Id.* at 61. Rather, the owner's loss must be measured by the property's value distinct from the power of the government to enhance value by combining properties: "The City is not to be made to pay for any part of what it has added to the land by thus uniting it with other lots, if that union would not have been practicable or have been attempted except by the intervention of eminent domain." *Ibid.*; see also *Powelson*, 319 U.S. at 274, 280-281, 285 (claimant not entitled to have value of his property increased by the possibility of its combination with other properties to create a hydroelectric project); *Olson*, 292 U.S. at 256 ("Value to the taker of a piece of land combined with other parcels for public use is not the measure of or a guide to the compensation to which the owner is entitled.").

Again, in *United States* v. *Fuller*, 409 U.S. 488 (1973), the owner of property taken by the government, which was

near federal land the owner leased under the Taylor Grazing Act, claimed that the value of his land should be measured by its potential use "in conjunction with" the grazing areas. *Id.* at 490. This Court held, however, that the government may not be charged under the Fifth Amendment "for elements of value that the Government has created." *Id.* at 492; see also *id.* at 499 (Powell, J., dissenting) (agreeing that "compensation need not be afforded for an increase in market value stemming from the very Government undertaking which led to the condemnation"); *United States* v. *Cors*, 337 U.S. 325, 334 (1949) ("That is a value which the government itself created and hence in fairness should not be required to pay."); *United States* v. *Causby*, 328 U.S. 256, 262 n.7 (1946) ("The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking.").[19]

This is not to say that a property owner may never claim as a compensable property interest the value of his land combined with other properties. But he may do so only "if the union of properties necessary is so practicable that the possibility would affect the market price." *Sage*, 239 U.S. at 61. The claimant must show, in other words, "a reasonable probability of the [property] in question being

[19] Federal regulation of interest payments sometimes has turned upon the amount of money deposited. See, *e.g.*, 12 C.F.R. 217.7 (1979). Respondents' argument would seem to claim as their private property the dollar amount of the difference between what the government permitted the bank to pay on accounts with higher principals and what the government permitted the bank to pay on their individual funds, because their funds, while individually incapable of generating such interest, could have earned it when pooled with the funds of others. Such convoluted claims are foreclosed because, under the logic of this Court's jurisprudence, the Fifth Amendment's definition of "private property" turns upon the presently practicable uses of property *by the owner*, rather than upon the anticipated use of property by others.

combined with other[s] * * * in the reasonably near future." *Powelson*, 319 U.S. at 275-276; see also *Olson*, 292 U.S. at 256.

Respondents cannot show that the property value they claim—the ability to combine with other clients' money to generate interest—could have been brought to fruition through their private efforts in the near future. To the contrary, Texas's IOLTA program is triggered only if the attorney concludes that pooling his or her clients' funds to earn interest for them is not economically feasible. IOLTA Rule 6; Texas Bar Rules, Art. XI, § 5(B); see also Pet. App. 24a n.2; Pet. Reply 2 n.1. Further, respondents have not shown that their attorneys or the attorneys' other clients wish to join them in this endeavor. "Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable," provide no basis for relief under the Just Compensation Clause, "for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value—a thing to be condemned in business transactions as well as in judicial ascertainment of truth." *Olson*, 292 U.S. at 257. Because the pooling of short-term and nominal client funds to generate interest is practicable only through an exercise of governmental power, respondents may not claim as their private property the economic value created by the IOLTA program. *United States* v. *Twin City Power Co.*, 350 U.S. 222, 228 (1956) ("What the Government can grant or withhold and exploit for its own benefit has a value that is peculiar to it and that no other user enjoys," and the government's generation of such value triggers no compensable property right in individuals.).[20]

[20] See also *United States* v. *Miller*, 317 U.S. 369, 375 (1943) (Fifth Amendment does not recognize as a compensable property interest the

In sum, respondents' claim of a property right to interest created through the IOLTA program must fail because it focuses on the interest-generating value gained by the government through the IOLTA program, rather than on any interest-generating capacity lost by the clients. Because "[t]hese additional values represent * * * no actual loss" to respondents, there "would be no justice in paying for a loss suffered by no one in fact." *Chandler-Dunbar*, 229 U.S. at 76.[21]

"special value" of property to the government); *Chandler-Dunbar*, 229 U.S. at 80 ("That the property may have to the public a greater value than its fair market value affords no just criterion for estimating what the owner should receive.").

[21] Respondents' alternative characterization of their property claim as a right to the equitable or beneficial interest in the trust account created by the lawyer, J.A. 11, 15, adds nothing to the case. The beneficial or equitable interest created by the individual clients' trust is zero. There are, of course, no proceeds from the trust at the time of its creation. See IA A. Scott & W. Fratcher, *The Law of Trusts* § 86 ("The mere fact that he hopes and expects to acquire the property in the future does not give him any interest of which he can be trustee, or of which he can make another trustee, before he acquires it."), § 86.4 ("An interest that has not come into existence cannot be held in trust.") (4th ed. 1987). Nor do respondents have any legitimate expectation that costs reasonably commensurate with the administrative expense of managing their money will not be withheld. IIA Scott & Fratcher, *supra*, § 182 (trustee is under a duty only to pay "net income, after deducting from the gross income the expenses properly incurred in the administration of the trust"); III Scott & Fratcher, *supra*, § 188.5. As with their interest claim, respondents are attempting to claim as their own "private property" the proceeds of a pool of funds created by the government. Those proceeds are made possible only by the additional presence of other people's money, over which principles of trust law give respondents no right of control. IA Scott & Fratcher, *supra*, § 86.4; see also *id.* § 75. Furthermore, respondents have not claimed that they have an ordinary trust relationship with their attorney regarding their funds. Instead, the relationship on which they rely is established and defined by the State's ethical rules governing members of the bar. Nothing in that regulatory framework empowers individual clients to control the proceeds of the IOLTA pool of funds. See *Massachusetts Bar Found.*, 993 F.2d at 974. And the focus of the attorney's ethical obligation is on safeguarding the money, not investing it. Formal Op. 348, 68 A.B.A. J. at 1503; see also IIA Scott & Fratcher, *supra*, §§ 180, 181.

2. While the foregoing cases primarily concerned the compensation prong of the Just Compensation Clause, their delineation of the types of property values protected by the Fifth Amendment against being taken applies with equal force to the Clause's definition of "private property." Indeed, it would make little sense to read "private property" as embracing an entire class of constitutionally protected interests (*i.e.*, value separately created or enjoyed by the government) for which the Just Compensation Clause will supply no remedy in the event of a deprivation. The animating purpose of the Just Compensation Clause, after all, is not to limit governmental interference with property, "but rather to secure *compensation*" when a taking occurs. *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 315 (1987); see also *Suitum* v. *Tahoe Regional Planning Agency*, 117 S. Ct. 1659, 1665 (1997); *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U.S. 172, 194 n.13 (1985) ("no constitutional violation occurs until just compensation has been denied"). The remedy provided by the Just Compensation Clause, moreover, is intended to provide the owner "the full and perfect equivalent" for the property taken. *United States* v. *Miller*, 317 U.S. 369, 373 (1943); *Seaboard Air Line Ry.* v. *United States*, 261 U.S. 299, 304 (1923) (same); see also *PruneYard Shopping Ctr.*, 447 U.S. at 82 n.6. The concept of just compensation "is comprehensive and in-

cludes all elements" of property value taken. *Jacobs* v. *United States*, 290 U.S. 13, 17 (1933).[22]

This Court, in fact, has previously recognized the nexus between the Clause's definitions of "property" and of "just compensation." In *First English Evangelical*, the Court held that a taking of property rights "necessarily implicates the constitutional obligation to pay just compensation." 482 U.S. at 315 (internal quotation marks omitted). Further, in *Powelson*, the Court expressly intertwined its analyses of the existence of a property right and the scope of compensation required by the Fifth Amendment. 319 U.S. at 279-283, 285; see also *United States* v. *Rands*, 389 U.S. 121, 126 (1967); *Twin City Power*, 350 U.S. at 227-228. Moreover, the very concept of "reasonable expectations" that this Court employs to identify property rights (see, *e.g.*, *Penn Central*, 438 U.S. at 125) precludes recognition of property values that the individual owners cannot practicably or reasonably realize themselves. Accordingly, the definition of "private property" adopted in this case must take account of the limitations on value recognized in this Court's compensation precedents, and therefore should not extend to interest that government alone can extract from funds within the banking system.

3. In holding that interest on an IOLTA account is private property, the court of appeals found significant the sequence in which bank fees and interest happened to be recorded. Pet. App. 13a. Because the interest was as-

[22] Just compensation, however, is calculated in objective, rather than subjective, terms. *United States* v. *564.54 Acres of Land*, 441 U.S. 506, 511 (1979). For that reason, respondents' philosophical objections to the purposes served by the governmental regulation have no bearing on the scope of the Constitution's protection. *Id.* at 511-512. Given the fungible character of money, this principle should apply with particular force to funds that, through deposit in a bank, have been injected by the owner into the national economic stream.

signed before the bank fees were deducted, the court of appeals concluded that "a property interest attaches the moment that the interest accrues," *ibid.*, even if the service fees deducted the next moment equaled or exceeded the interest gained.

The court of appeals' focus on the fleeting attachment of unattainable interest conflicts with this Court's repeated admonitions that the Just Compensation Clause is concerned with economically viable and productive uses of property, rather than with hypothesized or impalpable interests. See *Roth*, 408 U.S. at 577 ("To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it."); cf. *Hooker* v. *Burr*, 194 U.S. 415, 419 (1904) ("If not injured to the extent of a penny thereby, his abstract rights are unimportant.").

In *Lucas*, this Court characterized as a taking of private property a regulation that deprived the owner of all "economically beneficial or productive use of [the property]." 505 U.S. at 1015. Similarly, in *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), the Court reaffirmed that a regulation does not effect a taking if it does not deny an owner "economically viable use" of his or her property. *Id.* at 385 (quoting *Agins* v. *City of Tiburon*, 447 U.S. 255, 260 (1980)); see also *Yee*, 503 U.S. at 523 (taking analyzed in terms of whether the government deprives the owner of "the economic use of the property"); *United States* v. *Reynolds*, 397 U.S. 14, 16 (1970) ("In enforcing the constitutional mandate, the Court at an early date adopted the concept of market value."); *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 414 (1922) ("What makes the right to mine coal valuable is that it can be exercised with profit."). Indeed, it is only "reasonable expectations" that may give rise to a property claim under the Fifth Amendment. *Penn Central*, 438 U.S. at 125. Recognizing a property

right in interest that can never actually be realized, as the court of appeals did, would take the "reasonable" out of "reasonable expectations."[23]

D. *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith* Does Not Render IOLTA Programs Unconstitutional

The determination that interest earned on IOLTA accounts is not the private property of respondents is fully consistent with *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980). In *Webb's*, this Court held that the more than $100,000 in interest earned on an interpleaded fund belonged to the owners of the principal, and could not be diverted to the county treasury. *Id.* at 164. This Court explained that "[t]he earnings of a fund are incidents of ownership of the fund itself and are

[23] The court of appeals' discussion of the import of the Internal Revenue Service's Revenue Ruling 81-209 (Pet. App. 14a-15a) misunderstands the limited purpose of that ruling. The ruling discusses only whether IOLTA interest could be considered taxable income of the clients. Rev. Rul. 81-209, 1981-2 C.B. 16. It does not purport to address whether the interest is property, within the meaning of the Fifth Amendment. Furthermore, the income tax is imposed on "income from whatever source derived," not property. 26 U.S.C. 61(a); see also U.S. Const. Amend XVI. If it were a property tax, it would have to be apportioned among the States. U.S. Const. Art. I, § 9, Cl. 4; see also *Brushaber* v. *Union Pacific R.R.*, 240 U.S. 1, 12-19 (1916). The definitions of "income" and "property" are not coextensive, moreover. A taxpayer may derive income from a transaction in which he receives no property. *E.g.*, 26 U.S.C. 132(f)(2)(B); *Hillsboro Nat'l Bank* v. *Commissioner*, 460 U.S. 370, 377-385 (1983); *United States* v. *Kirby Lumber Co.*, 284 U.S. 1, 3 (1931); *Old Colony Trust Co.* v. *Commissioner*, 279 U.S. 716, 729-731 (1929). See also *Cone*, 819 F.2d at 1007 n.8. The court's focus on the particular order in which the banking transactions occurred is also in tension with this Court's recognition in *Sperry* that "money is fungible" and that "[n]o special constitutional importance attaches to the fact that the Government deducted its charge directly from the award rather than requiring Sperry to pay it separately." 493 U.S. at 62 n.9.

property just as the fund itself is property." *Ibid.* Because the interest earned in that case far exceeded the administrative costs and fees associated with its generation, *id.* at 159-160, this Court did not address or question the State's power to retain interest reasonably commensurate to the cost of servicing the account. *Id.* at 160, 165. Rather, the Court carefully confined its holding to

> the narrow circumstances of this case—where there is a separate and distinct state statute authorizing a clerk's fee "for services rendered" based upon the amount of principal deposited; where the deposited fund itself concededly is private; and where the deposit in the court's registry is required by state statute in order for the depositor to avail itself of statutory protection from claims of creditors and others.

Id. at 164.

The present case differs from *Webb's* in three significant respects. First, *Webb's* did not involve government-created value. The *Webb's* claimants' principal was capable, under existing interest rules, of generating realizable interest without any government intervention or alteration of the underlying condition of the property. The interest-generating principal was "concededly * * * private." 449 U.S. at 164. Here, by contrast, the fund that actually generates realizable interest is a public creation. In the absence of the governmental program pooling the funds, no interest could or would be realized. See *Twin City Power*, 350 U.S. at 228 (no compensable property right exists where "[t]he right has value or is an empty one dependent solely on the Government").

Second, any interest actually earned by respondents' funds would not, by definition, exceed the administrative costs of servicing the account and allocating the interest to them individually. *Webb's* did not suggest that accrued interest that falls below a reasonable estimation of the

costs and fees associated with managing an account must, as a matter of constitutional law, be regarded as the private property of the beneficial owners of the principal. *Webb's* dealt only with interest that was actually realizable under state law, separate and apart from appropriate service charges. 449 U.S. at 161, 162, 164; see also *Sperry*, 493 U.S. at 62 & n.8; cf. *Colorado Springs Prod. Credit Ass'n* v. *Farm Credit Admin.*, 967 F.2d 648, 657-658 (D.C. Cir. 1992).

Third, while state law governs what happens to the funds when a client provides money to an attorney, no client is "required by state statute" to give money to his attorney as a precondition for availing himself of the protections of the legal system. *Webb's*, 449 U.S. at 164. Whether or not funds will come into the possession of an attorney is generally a matter of contractual agreement between client and counsel.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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